Supreme Court, U.S.
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No. 87-1297

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

JOHN DAVID ABLE, a minor under the age of fourteen (14) years, by his guardian *ad litem*, Gloria E. Day,

Petitioner

versus

THE UPJOHN COMPANY, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Where the jurisdictional facts at the time of final judgment supported the exercise of the district court's jurisdiction, did the Court of Appeals properly affirm the district court's jurisdiction to enter final judgment despite a defect in removal?

## LIST OF PARTIES

The parties to the proceeding below were:

Petitioner: John David Able, a minor under the age of fourteen (14) years, by his guardian *ad litem*, Gloria E. Day.

Respondent: The Upjohn Company, misnamed in the proceedings below as "The Upjohn Company, Inc."

James H. Blair, who was originally a party defendant in the district court, was not a party in the Court of Appeals. The case against him was remanded to the State court by the district court on July 15, 1986, and he was not a party when judgment was entered by the district court.

The Upjohn Company is a corporation. It has no parent company. Its subsidiaries (except wholly owned subsidiaries) and affiliates are: Asgrow Mexicana, S.A. de C.V.; CareTec; Cobb-Vantress, Inc.; Japan Upjohn Limited; Korea Upjohn Ltd.; NorthCoast Hospital Home Care; P. T. Upjohn Indonesia and Upjohn Nigeria Pty, Limited.

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1A Moore's Federal Practice 0.157[11.-3], at 172-173 ..... 6

## STATEMENT OF THE CASE

The petitioner's statement of the case omits certain important background facts.

This case was a companion to other related cases resulting from the same circumstances (petitioner's mother's ingestion of a drug prescribed by her physician.)

On April 22, 1983, petitioner's mother, Mrs. Cecelia Able, brought suit in Federal court against The Upjohn Company. After discovery and Upjohn's motion for summary judgment, Mrs. Able moved for and was granted a voluntary dismissal on December 19, 1984.

In March 1985, Mrs. Able brought a new suit, and Mr. Able (petitioner's father) and the petitioner brought separate suits, all in State court. Mr. and Mrs. Able's suits named only Upjohn as a defendant; the petitioner's suit named both Upjohn and the prescribing physician, Dr. James H. Blair. All three complaints alleged against Upjohn identical causes of action and specifications of alleged wrongdoing.

Upjohn removed all three cases on April 11, 1985. There was complete diversity of citizenship in Mr. and Mrs. Able's cases, and removal was not challenged. Upjohn removed the petitioner's suit under 28 U.S.C. § 1441(c) on the ground that the claim against Upjohn was separate from and independent of the claim against Dr. Blair and involved separate "wrongs."

Subsequently, on October 28, 1985, the district court entered an order, consented to by the Ables' and Upjohn's counsel, consolidating the three cases and ordering that the discovery developed in Mrs. Able's first suit could be used in the new suits.

Petitioner filed his motion to remand on February 25, 1986.

At a hearing on April 15, 1986, on the petitioner's claim to remand his suit, Dr. Blair moved to sever the claim against him and remand it to State court. At the hearing, the district judge indicated he would deny petitioner's remand motion and grant Dr. Blair's motion. An order denying the petitioner's motion for remand was issued the same day. The petitioner neither pursued an interlocutory appeal under 28

U.S.C. § 1292(b), nor sought review in the Court of Appeals by writ of mandamus. The district court, exercising the discretion granted by 28 U.S.C. § 1441(c), entered the order remanding the claim against Dr. Blair on July 17, 1986. Again, petitioner sought no interlocutory appeal or writ of mandamus.

As a result of the remand of the claim against Dr. Blair, there was complete diversity between the remaining parties in the district court after July 17, 1986.

Subsequently Upjohn moved for summary judgment. At the hearing, petitioner withdrew a specification of his complaint, leaving as the only ground for his claim against Upjohn the failure to give a patient warning to the petitioner's mother. The district court granted Upjohn's motion on the basis of settled law that the manufacturer of a prescription drug has a duty to warn only the prescribing physician and not the patient. See *Brooks v. Medtronic, Inc.*, 750 F.2d 1227 (4th Cir. 1984); *Stanback v. Parke, Davis and Company*, 657 F.2d 642 (4th Cir. 1981).

Thereafter, petitioner appealed to the Court of Appeals for the Fourth Circuit, raising only the removal issue. A unanimous panel of the Fourth Circuit affirmed, and petitioner's petition for rehearing and suggestion for rehearing *en banc* were denied.

The opinion of the Court of Appeals is reported at 829 F.2d 1330. The Court did not unequivocally hold that removal was improper or that the district judge committed reversible error in failing to remand. Although the Court did state that the statute and cases "would have supported remand" (p. 1332), it cautioned that "clear lines are difficult to draw" (p. 1333). It concluded, however, that removal was of "dubious propriety" and that the district court should have returned the entire case to State court (p. 1333).

Despite "doubts ... about the initial propriety of the removal" (p. 1333), the Court of Appeals affirmed the summary judgment. Citing *American Fire & Casualty v. Finn*, 341 U.S. 6 (1951), and other cases, the Court held that the judgment "works no expansion of federal jurisdiction" and should be affirmed in the interests of judicial economy. When summary judgment was entered, there was complete diversity between the parties, and therefore the case would have

been within the Federal court's jurisdiction had it been brought in the posture it had at the time of judgment. The Court pointed out that the petitioner failed to seek an interlocutory appeal under 28 U.S.C. § 1292(b), and thus ran the risk that the district court would enter a judgment on the basis of complete diversity between the parties. Responding to the argument that an interlocutory appeal is not a matter of right and requires certification by a district judge, the Court stated that if a district court withheld certification in a doubtful case, the appellate court would examine the appeal in the light of that fact.

Since the case had proceeded to judgment on the merits and the principles of federal jurisdiction remained uncompromised, considerations of judicial economy supported affirmance.

## SUMMARY OF ARGUMENT

The Fourth Circuit's decision in this case

(a) is not in conflict with other circuits;
(b) is supported by prior decisions of the Supreme Court of the United States and other circuits;
(c) works no expansion of federal jurisdiction; and
(d) is a reasonable application of the doctrine of judicial economy.

## REASONS WHY THE PETITION SHOULD BE DENIED

1. *The decision is not in conflict with other circuits.*

The petitioner asserts that the decision is in conflict with the Third Circuit's decision in *La Chemise Lacoste v. The Alligator Company, Inc.*, 506 F.2d 339 (3rd Cir. 1974), *cert. denied*, 421 U.S. 937 (1975), where the Court, on appeal from a final judgment, reversed the trial court's refusal to remand. That is the only case and the only circuit which the petitioner asserts is in conflict with the Fourth Circuit's decision in this case. There is no conflict with *La Chemise Lacoste*, however.

In *La Chemise Lacoste*, the plaintiff had attempted unsuccessfully to have the district court's order denying remand certified for interlocutory appeal. Therefore, the Court

held that the plaintiff had not "waived the right to challenge the denial of the motion to remand." 506 F.2d at 342. "[P]laintiff did all it could have done by way of seeking review of the denial of its motion to remand." 506 F.2d at 342, n.1.

In the instant case, as the Fourth Circuit pointed out, the petitioner did nothing to seek review of the denial of his motion to remand. He failed to seek an interlocutory appeal under 28 U.S.C. § 1292(b), as other parties in other cases have done. *See, e.g., Union Planters National Bank of Memphis v. CBS, Inc.*, 557 F.2d 84 (6th Cir. 1977). [Petitioner also sought no writ of mandamus, which, although of doubtful applicability here, has been used by some circuits to review otherwise unappealable orders of district courts. *See, e.g., Carnegie-Mellon University v. Cohill*, _____ U.S. _____, 56 LW 4101 (1988) (remand order); *Hoffman v. Blaski*, 363 U.S. 335 (1960) (transfer of venue orders) ].

Since the petitioner here did nothing to seek review of the district court's order, *La Chemise Lacoste* is not in conflict with the Fourth Circuit's decision. Indeed, the Fourth Circuit's decision is consistent with *La Chemise Lacoste*, in that the Fourth Circuit made a point of saying that if certification for review were denied by a district court where removal was doubtful, the Court of Appeals would "examine an appeal in the light of that fact." 829 F.2d at 1334.

2. *The decision is supported by prior decisions of the Supreme Court and other circuits.*

The Fourth Circuit's decision relied upon and is supported by *American Fire & Casualty v. Finn*, 341 U.S. 6, 16 (1951):

> [T]here are cases which uphold judgments in the district courts even though there was no right to removal. In those cases the federal trial court would have had original jurisdiction of the controversy had it been brought in the federal court in the posture it had at the time of the actual trial of the cause or of the entry of the judgment. That is, if the litigation had been initiated in the federal court on the issues and between the parties that comprised

> the case at the time of trial or judgment, the federal court would have had cognizance of the case.

The same general principle—that irregularities in removal can be waived and that a judgment will be upheld if, at the time of judgment, the jurisdictional facts support federal jurisdiction—was applied in *Mackay v. Uinta Development Co.*, 229 U.S. 173, 176 (1913), which held:

> [R]egardless of the manner in which the case was brought or how the attendance of the parties in the United States court was secured, there was presented to the circuit court a controversy between citizens of different States in which the amount claimed by one non-resident was more than $2000, exclusive of interest and costs.

The doctrine was applied by a unanimous Supreme Court in *Grubbs v. General Electric Credit Corp.*, 405 U.S 699 (1972). Although the removal was without objection, the Court did not appear to base its holding on that fact, but rather on *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951):

> We conclude that the requirement that jurisdiction exist at the time of judgment, stated in that case [Finn], is satisfied here where the District Court had jurisdiction to render judgment as between the [parties].

405 U.S. at 705.

The Fourth Circuit decision also finds support from at least two other circuits.

*Gould v. Mutual Life Insurance of New York*, 790 F.2d 769 (9th Cir.), *cert. denied*, _____ U.S. _____, 107 S.Ct. 580, 93 L.Ed.2d 582 (1986), is a case closely in point. The case had been removed after the state court had dismissed two non-diverse co-defendants. The plaintiff's motion to remand was denied and the district court later granted summary judgment. The Court of Appeals held that the district court had erred in not remanding, but since the plaintiff made no attempt to take an interlocutory appeal, the *Finn* rule applied. The Court affirmed the district court's grant of summary judgment, since, at the time it was granted, the case was in such a posture that federal jurisdiction attached.

See also *Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983); *Sheeran v. General Electric Co.*, 593 F.2d 93 (9th Cir.), *cert. denied*, 444 U.S. 868 (1979).

In *Smith v. City of Picayune*, 795 F.2d 482 (5th Cir. 1986), the Fifth Circuit applied the same doctrine, holding:

> Since, at the time of judgment in this case, the district court did have subject matter jurisdiction of the case based on Smith's constitutional claims and the presence of the FmHA as an intervenor-defendant, we will not now dismiss the suit on the basis of the impropriety of removal at the time it occurred.

795 F.2d at 485.

Summarizing the principle, *Moore's Federal Practice* says:

> And even where a case is not, or does not appear to be within the original jurisdiction of the federal court *at the time of removal*, a judgment entered by the trial court is valid if at the time of the actual trial or the entry of judgment the requisites of original jurisdiction existed. (Emphasis in original.)

1A *Moore's Federal Practice* ¶ 0.157[11.-3] at 172-173.

3. *The case does not expand Federal jurisdiction.*

The Fourth Circuit decision does not expand Federal jurisdiction, since its effect is to look at the jurisdictional facts at the time judgment was entered. This is the approach taken by *Mackay, supra; Finn, supra; Grubbs, supra* and the circuit court decisions cited above. It recognizes, as those cases do, that while subject matter jurisdiction may not be waived, procedural matters may be, as a result of which the district court may have jurisdiction at the time it enters judgment. There is no expansion of Federal jurisdiction because the jurisdictional facts at the time of judgment are sufficient to support Federal jurisdiction.

The petitioner's failure to seek review of the denial of his motion to remand constituted a kind of waiver, similar in legal effect to a failure to move for remand. If a court may properly uphold a final judgment where the now-complaining party failed to move to remand an improperly removed case, it is logically consistent to uphold a judgment where a

party fails to seek review of a denial of remand. As the Fourth Circuit pointed out, if the district court should refuse § 1292(b) certification in a doubtful case, that fact would be considered on the appeal from final judgment.

Moreover, since the Fourth Circuit disapproved of the basis for removal, the decision is not precedent for enlarged Federal jurisdiction based on a more liberal reading of 28 U.S.C. § 1441(c).

4. *The decision is a reasonable application of the doctrine of judicial economy.*

By the time of the hearing on Upjohn's motion for summary judgment, the sole remaining basis for the petitioner's claim against Upjohn was the failure to give a patient warning to petitioner's mother. Under settled law of the Fourth Circuit (*Stanback v. Parke, Davis and Company*, 657 F.2d 642 [4th Cir. 1981] ) and based on the Fourth Circuit's view of the applicable South Carolina law (*Brooks v. Medtronic, Inc.*, 750 F.2d 1227 [4th Cir. 1984] ), that claim stated no cause of action. By the time the case reached the Fourth Circuit, summary judgment had been entered against Mr. and Mrs. Able, as to which no appeal was taken. In fact, no appeal was taken in petitioner's case on the merits of the grant of summary judgment.

If, despite the petitioner's failure to seek review of the denial of remand, the Fourth Circuit had remanded the case to the State court to join the then pending claim against Dr. Blair, there would have been a considerable waste of judicial resources and counsel's time, most probably without a different ultimate result.

None of the discovery used in the petitioner's case would have been available in the State court, because it was taken from Mrs. Able's first lawsuit and Dr. Blair was not a party. After discovery, assuming the Fourth Circuit had accurately assessed South Carolina law, a motion by Upjohn for summary judgment would presumably have been granted. In such case, the parties would be in the same position they are now, after much additional expense and time spent by judges, lawyers and litigants. Only if the South Carolina courts departed from the settled law of almost every jurisdiction to

require a patient warning for prescription drugs could petitioner hope to prevail.

Petitioner has had his day in court. Nobody would be well served by sending this case back and forth between the Federal and State judicial systems.

Since the case effects no expansion of Federal jurisdiction, is no precedent for removal under similar circumstances, and is based in part on petitioner's failure to seek earlier review, the Fourth Circuit's decision was a reasonable application of the doctrine of judicial economy.

## CONCLUSION

For the above reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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